

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Travelers Casualty And Surety Company)
Of America, a Connecticut Corporation,

Plaintiff,

vs.

Telstar Construction Company, Inc., a
New Mexico Corporation; Skycorp
Electrical, Inc., an Arizona Corporation;
Terry D. Corlis and Pauline L. Corlis,
husband and wife; And Tom Wayne
Walstrom And Suzanne Walstrom,
husband and wife,

Defendants.

No. CIV 02-1111-PHX-ROS

ORDER

This action arose from Plaintiff Travelers' attempt to collect from Defendant Telstar and Defendants the Corlises,¹ officers of Telstar, pursuant to an indemnification agreement for losses resulting from the execution and delivery of surety bonds. Plaintiff filed a Complaint against the Defendants alleging breach of contract. Defendants filed a Motion to Dismiss for (1) lack of personal jurisdiction; (2) lack of venue; and (3) improper process and service of process. Plaintiff's Response included various affidavits and exhibits not relied

¹Plaintiff also sued Skycorp Electrical, Inc. and the Walstroms, officers of Skycorp. However, on December 19, 2002 a Notice of Settlement was filed stating that the litigation against these Defendants will be terminated by February 17, 2003. (Doc. #45).

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1 on in the Complaint. Defendants' Reply contained a Motion to Strike these documents.
2 Plaintiff, reacting to the Motion to Strike, filed a Request for Leave to File Supplemental
3 Exhibits. For the reasons stated below, the Court will (1) grant Defendants' Motion to
4 Dismiss; (2) partially grant and partially deny Defendants' Motion to Strike; and (3) grant
5 Plaintiff's Request for Leave to File Supplemental Exhibits.

6 BACKGROUND

7 A. Complaint

8 On June 14, 2002 Plaintiff filed a Complaint (Doc. #1) alleging that Defendants
9 Telstar Construction Company, Inc. ("Telstar") and Defendants Terryl D. Corlis and Pauline
10 L. Corlis breached a contractual agreement to indemnify Plaintiff for losses sustained from
11 transactions involving various surety bonds.

12 Plaintiff is a Connecticut corporation, authorized to do business in the states of
13 Arizona and New Mexico. Defendant Telstar is a New Mexico corporation which does
14 business in New Mexico and Arizona. Defendants Terryl D. Corlis and Pauline L. Corlis are
15 (1) owners in various construction companies, including Defendant Telstar, and (2) New
16 Mexico residents who own a residence in Maricopa County, Arizona.

17 The Defendants executed an agreement in New Mexico under New Mexico law on
18 May 14, 2001 with Plaintiff wherein Plaintiff agreed to execute and deliver surety bonds for
19 Telstar and Skycorp Electrical, Inc. ("Skycorp"). As a consequence, Defendants promised
20 to completely indemnify Plaintiff for any losses resulting from the agreement. In reliance
21 on this agreement, Plaintiff issued surety bonds to Telstar and Skycorp. Under the bonds,
22 Plaintiff incurred expenses exceeding \$12 million.

23 After filing the Complaint, Plaintiff served (1) Defendant Telstar through its statutory
24 agent in Arizona and (2) the Corlises at their homes in both New Mexico and Arizona.

1 **B. Plaintiff and Defendant Motions**

2 **1. Defendants' Motion to Dismiss**

3 On August 13, 2002, Defendants filed a Motion to Dismiss Pursuant to Rule 12(b) on
4 Behalf of Defendants Telstar Construction Company, Inc., Terryl D. Corlis and Pauline
5 Corlis ("M. Dis.") (Doc. #10) that alleges three grounds: (1) lack of personal jurisdiction
6 under Fed. R. Civ. P. 12(b)(2); (2) improper venue under Fed. R. Civ. P. 12(b)(3); and (3)
7 insufficient process and service of process under Fed. R. Civ. P. 12(b)(4) and 12(b)(5). In
8 conjunction with the M. Dis., Defendants filed a Separate Statement of Facts ("SOF"). (Doc.
9 #11).

10 On September 16, 2002, Plaintiff filed a Response to Motion to Dismiss ("Response
11 to M. Dis."), (Doc. #27), alleging that personal jurisdiction exists for all of the Defendants,
12 and that both venue in this Court and service of process are proper. With the Response to
13 M. Dis., Plaintiff submitted a number of affidavits and exhibits.

14 **2. Defendants' Motion to Strike**

15 On October 4, 2002, Defendants filed a reply styled, "Reply in Support of Motion to
16 Dismiss, Including Evidentiary Objections to Affidavits and Documents Submitted by
17 Plaintiff and Motion to Strike Same" ("M. Strike"). (Doc. #32). In the M. Strike,
18 Defendants object on various grounds, including hearsay, lack of foundation, speculation,
19 lack of authentication and lack of personal knowledge. Defendants allege that their M. Dis.
20 must be treated as a Motion for Summary Judgment under Fed. R. Civ. P. 56 because matters
21 outside the pleadings were submitted with the motion.

22 On October 23, 2002, Plaintiff filed a response styled "Response to Motion to Strike
23 Affidavits and Documents Submitted by Plaintiff with its Response to Motion to Dismiss"
24 ("Response to M. Strike") (Doc. #36). Plaintiff claims that Defendants' M. Dis. is not subject
25 to Fed. R. Civ. P. 56, and even if it were, the materials submitted by Plaintiff should be
26 considered by the Court.

1 **3. Plaintiff's Motion for Leave to Supplement**

2 On October 8, 2002, Plaintiff filed a pleading styled "Request for Leave to File
3 Supplemental Exhibits in Support of Response to Motion to Dismiss and Supplemental
4 Response to Motion to Dismiss" ("Request for Leave to File") (Doc. #33). On October 28,
5 2002, Defendants filed a Response to Plaintiff's Request for Leave to File. (Doc. #35). Four
6 days later Plaintiff filed a Reply to its Request for Leave to File (Doc. #38). Three days later,
7 Defendants filed a pleading styled "Reply in Support of Evidentiary Objections to Affidavits
8 and Documents Submitted by Plaintiff and Motion to Strike Same" that addresses both issues
9 raised in their M. Strike and Plaintiff's Request for Leave to File. (Doc. #39).

10 **ANALYSIS**

11 Pending before the Court are (1) Defendants' Motion to Dismiss; (2) Defendants'
12 Motion to Strike; and (3) Plaintiff's Motion for Leave to Supplement. Before turning to
13 these Motions, the Court must determine if subject matter jurisdiction exists.

14 **A. Subject Matter Jurisdiction**

15 In their Reply to the M. Dis., Defendants raised for the first time the issue of
16 subject matter jurisdiction. (Reply M. Dis. at 8) (Doc. #32). On December 2, 2002, the
17 Court ordered supplemental briefing on this issue. (Doc. #40). After careful review of
18 the supplemental briefing, the Court issued a December 24, 2002 Order finding diversity
19 jurisdiction pursuant to 28 U.S.C. § 1332.

20 **B. Motion for Leave to Supplement**

21 On October 8, 2002, Plaintiff filed its Motion for Leave to Supplement without
22 seeking agreement from Defendants. Plaintiff requests supplementation in two ways.
23 First, Plaintiff desires to include additional affidavits and exhibits that concern contacts
24 by Defendants with Arizona. Second, Plaintiff desires to include evidence of the Corlises
25 being served while at their residence in Arizona.

26 In a Response, Defendants remark that Plaintiff neglected to request a stipulation
27 from them before filing its Motion. "Had such a request been made, Defendants would
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1 have stipulated to such.” (Response M. Supp. at 2) (Doc. #35). Defendants then
2 incorporate by reference their prior objections to Plaintiff’s affidavits and exhibits. Id.

3 Because Defendants have consented to the granting of Plaintiff’s Motion for Leave
4 to Supplement, it will be granted and the Court will consider Plaintiff’s supplemental
5 material, as well as Defendants’ objections to the admissibility of that material.

6 **C. Motion to Strike**

7 **1. Defendants’ Arguments**

8 In their Reply in Support of Motion to Dismiss, Defendants include a Motion to
9 Strike various documents submitted by Plaintiff (“M. Strike”). Defendants contend,
10 without citing to any legal authority, that their Motion to Dismiss should be considered by
11 the Court as a Motion for Summary Judgment. (Defs.’ M. Strike at 4 n.2). Defendants
12 claim their Rule 12 M. Dis. should be converted to a Rule 56 Motion for Summary
13 Judgment merely because they submitted an affidavit with their separate SOF.
14 Defendants further contend that the evidence offered by the Plaintiff must be admissible.

15 **2. Legal Standard and Analysis**

16 **a. The Submission by Plaintiff of Various Documents in Response to** 17 **the M. Dis. does not Convert it into a Summary Judgment Motion.**

18 Federal Rule of Civil Procedure 12(b) states:

19 *If, on a motion asserting the defense numbered (6) to dismiss*
20 *for failure of the pleading to state a claim upon which relief*
21 *can be granted, matters outside the pleading are presented to*
22 *and not excluded by the court, the motion shall be treated as*
23 *one for summary judgment and disposed of as provided in*
24 *Rule 56 [of the Federal Rules of Civil Procedure], and all*
25 *parties shall be given reasonable opportunity to present all*
26 *material made pertinent to such a motion by Rule 56.*

27 Fed. R. Civ. P. 12(b) (emphasis added). Defendants’ M. Dis., however, is not based upon
28 Fed. R. Civ. P. 12(b)(6) because Defendants only sets forth three arguments: (1) lack of
personal jurisdiction under Fed. R. Civ. P. 12(b)(2); (2) improper venue under Fed. R.
Civ. P. 12(b)(3); and (3) insufficient process and service of process under Fed. R. Civ. P.

1 12(b)(4) and 12(b)(5). Therefore, Defendants' M. Dis. is not subject to transformation to
2 a Motion for Summary Judgment.

3 Because Defendants' M. Dis. is based on Rules 12(b)(2)-(5) of the Federal Rules
4 of Civil Procedure, the Court may consider written materials in connection with the
5 Motion without transforming it into a Motion for Summary Judgment. It is well
6 established that the Court may consider affidavits and other materials when weighing a
7 Motion to Dismiss for lack of personal jurisdiction under Rule 12(b)(2) without
8 transforming the motion into a Motion for Summary Judgment. Doe v. Unocal Corp., 248
9 F.3d 915, 922 (9th Cir. 2001); Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc., 551 F.2d 784,
10 787 (9th Cir. 1977); Bach v. McDonnell Douglas, Inc., 468 F. Supp. 521, 524 (D. Ariz.
11 1979). In Rule 12(b)(2) motions, "[t]he court may consider evidence presented in
12 affidavits to assist in its determination and may order discovery on the jurisdictional
13 issues." Doe, 248 F.3d at 922 (citing to Data Disc, Inc. v. Sys. Tech. Assoc., Inc., 557
14 F.2d 1280, 1285 (9th Cir. 1977)). In fact, a plaintiff, in defending itself against a motion
15 to dismiss for lack of personal jurisdiction is "obligated to come forward with facts, by
16 affidavit or otherwise, supporting personal jurisdiction." Amba, 551 F.2d at 787 (citing
17 to Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (9th Cir. 1967).

18 Further, when resolving a motion to dismiss under Rule 12(b)(3), the Court may
19 also consider supplemental written materials. Argueta v. Banco Mexicano, S.A., 87 F.3d
20 320, 324 (9th Cir. 1996); Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty, 294 F.3d
21 1171, 1174 (9th Cir. 2002). "Analysis under Rule 12(b)(3) . . . permits the district court
22 to consider facts outside of the pleadings." Argueta, 87 F.3d at 324.

23 Moreover, parties may submit affidavits and exhibits with a motion to dismiss
24 under Rule 12(b)(5) as well. Grantham v. Challenge-Cook Bros., Inc., 420 F.2d 1182,
25 1186 (7th Cir. 1969); Vance Prods., Inc. v. Oasis Med., Inc., No. IP 01-0585-C-B/S, 2002
26 WL 449798, at *1 (S.D. Ind. Mar. 20, 2002); Torrespico v. Columbia Coll., No. 97 C
27 8881, 1998 WL 703450, at *2 n.3 (N.D. Ill. Sept. 30, 1998); Ellis v. Welch, No. 92 C
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1 4633, 1994 WL 87387, at *2 (N.D. Ill. Mar. 14, 1994); SGS-Thompson Microelectronics,
2 Inc. v. United Microelectronics Corp., No. C-92-1098-DLJ, 1993 WL 299230, *2 (N.D.
3 Cal. July 21, 1993); Welles Products Corp. v. Plad Equipment Co., Ltd., 563 F. Supp.
4 446, 448 (N.D. Ill. 1983). “The court may receive affidavits introduced by the parties
5 when considering a Rule 12(b)(5) motion.” Vance, 2002 WL 449798, at *1 (citing to
6 Trotter v. Oppenheimer & Co., Inc., No. 96 C 1238, 1997 WL 102531, at *2 (N.D. Ill.
7 Mar. 4, 1997)). “Factual questions concerning a 12(b)(5) motion, regarding the manner
8 in which service was executed, may be determined by the Court through affidavits,
9 depositions, or oral testimony.” SGS-Thompson, 1993 WL 299230, at *2.

10 Finally, both Rule 12(b)(4) and 12(b)(5) motions set forth similar jurisdictional
11 arguments, and there is no authority or reason to differentiate between Rule 12(b)(5) and
12 Rule 12(b)(4) regarding the documents that the Court may consider without converting
13 the motion to one for summary judgment.

14 Therefore, the Court may and will consider affidavits and exhibits submitted by
15 both parties for resolving Defendants’ M. Dis., and not convert this Motion into one for
16 summary judgment.

17 **b. The Supporting Documents Concerning the M. Dis. Must Conform**
18 **to the Rules of Evidence**

19 It is equally as clear, however, that Plaintiff’s affidavits and exhibits submitted in
20 support of the Response to the M. Dis. must comply with the Rules of Evidence.
21 Hancock v. Hitt, No. C-98-960-MMC-(ARB), 1998 WL 345392, at *2 (N.D. Cal. June
22 19, 1998) (“plaintiff must produce *admissible evidence* to support the court’s exercise of
23 personal jurisdiction”) (emphasis added); Fujitsu-ICL Sys. Inc. v. Efmak Serv. Co., No.
24 00-CV-0777-W-(LSP), 2000 WL 1409760, at *3 (S.D. Cal. June 29, 2000) (“a prima
25 facie showing means that plaintiff has produced *admissible evidence*, which, if believed,
26 would be sufficient to establish the existence of personal jurisdiction”) (emphasis added).

1 Therefore, the Court will consider each of Defendants' objections to Plaintiff's
2 evidence to determine if the evidence complies with the Rules of Evidence.

3 **1) Affidavit of Eric R. Mausolf**

4 Defendants object to four different portions of the Mausolf Affidavit.

5 **a) Spreadsheet Data in Exhibit 1**

6 It is argued that Exhibit 1 attached to the affidavit must be struck because it
7 constitutes hearsay and lacks foundation. (Reply M. Dis. at 2) (Doc. #32).

8 In Paragraph 2, Mausolf states: "Travelers issued payment and performance bonds
9 to Telstar Construction, Inc. on various public works projects located in both Arizona and
10 New Mexico. The name of the projects, the value of the contracts, and the location where
11 the projects is reflected (sic) on the spreadsheet attached hereto as Exhibit '1'."
12 (Response M. Dis. at 2) (Doc. #27). Exhibit 1 summarizes 24 claims in a table.

13 Plaintiff responds to Defendants' objection by arguing that in Paragraph 1,
14 Mausolf states that "I make this affidavit of my own personal knowledge." (Doc.
15 #39). According to Plaintiff, this allegation should be construed liberally and it suffices
16 to overcome Defendant's hearsay and lack of foundation objections. Opinions cited by
17 Plaintiff include Bader v. Fleschner, 463 F. Supp. 976, 982 (S.D.N.Y. 1978) (suggesting
18 that district court should accept all ambiguities, and draw all reasonable inferences, in
19 favor of non-moving party when addressing defects in affidavits or papers), and State of
20 La., ex. rel. Guste v. U.S., 656 F. Supp. 1310, 1314 (W.D.La. 1986), affirmed 832 F. 2d
21 935, rehearing denied 836 F.2d 1346 (1987) (allowing admission of various exhibits for
22 summary judgment motion despite failure of "literal compliance" with foundation
23 requirements because such compliance "serves no purpose" when the documents were
24 produced via discovery from the objecting party).

25 The Court disagrees and finds that the data contained in Exhibit 1 is hearsay and
26 may not be considered by the Court. Plaintiff relies on cases other than those in the Ninth
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1 Circuit.² In the Ninth Circuit, regardless of the source of evidence, proper foundation
2 must be laid. Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1028 (9th Cir.
3 2001) (“A plaintiff’s belief . . . without evidence supporting that belief, is no more than
4 speculation or unfounded accusation . . . [Plaintiff] failed to show *personal knowledge*.
5 It is not enough for a witness to tell all she knows; she must know all she tells.”)
6 (emphasis added); Fed. R. Evid. 602 (prohibiting a witness from testifying on a matter
7 “unless evidence is introduced sufficient to support a finding that the witness has personal
8 knowledge of the matter”).

9 Plaintiff provides no facts establishing Mausolf possessed the legal requisite of
10 personal knowledge of the information contained in Exhibit 1. Instead, Plaintiff argues
11 the Court should assume personal knowledge based on a conclusory statement by
12 Mausolf. Such conclusory affidavits fail to establish foundation. Far Out Productions,
13 Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001) (rejecting conclusory affidavits because
14 they failed to either set forth specific facts or identify with reasonable particularity
15 evidence that would preclude summary judgment); Fujitsu, 2000 WL 1409760 at *2
16 (“The allegations contained in the affidavits and pleadings may not be merely conclusory,
17 but rather, must assert particular facts which establish the necessary ties between the
18 defendant and the forum state.”).

19 Moreover, even if the New York and Louisiana cases cited by Plaintiff were not
20 contrary to Ninth Circuit law, they are distinguishable. In State of La., ex. rel. Guste, the
21 District Court determined that “literal compliance” with the foundation requirements
22 served no purpose when the documents were produced via discovery from the objecting
23 party. In that case, the question posed to the objecting party made its act of producing the
24 documents sufficient to establish authentication and/or an exception to hearsay. 656 F.
25 Supp. at 1314. Such circumstances do not exist in this case.

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27 ²The Court’s independent research did not uncover any Ninth Circuit opinions
28 endorsing the viewpoint of the New York and Louisiana District Courts in the two cases
cited.

1 **b) Exhibit 2 and Lines 16-20 on Page 2**

2 Next, Defendants contend that Exhibit 2 to the affidavit and Lines 16-20 on Page 2
3 must be struck as hearsay, lacking foundation, and containing allegations based on
4 hearsay.

5 Mausolf states at Lines 16-20 on Page 2: "Travelers made several rental payments
6 on that office space on behalf of Telstar. Based on Telstar's own records, it had office
7 space in Arizona at least as early as November 2000. See fax cover sheet bearing Telstar
8 name and listing Arizona business address dated November 1, 2000 attached hereto as
9 Exhibit '2'." (Response M. Dis. at 2) (Doc. #27). Additionally, Plaintiff offers copy of
10 the actual lease for this office space in its Supplemental Exhibits. (Supp. Exhibits at
11 A(4)) (Doc. #33).

12 Plaintiff alleges it obtained both the fax cover sheet and the lease via discovery
13 from Defendants (Response M. Strike at p.9) (Doc. #36) and again relies on State of La.,
14 ex rel. Guste, 656 F. Supp. at 1314. The Ninth Circuit, however, requires proper
15 foundation for all evidence, regardless of source. See, supra, at pp.9-10. Moreover, even
16 if the foundation can be laid by opposing counsel's production of documents during
17 discovery, Plaintiff has failed to provide evidence establishing that the question asked that
18 triggered production of the documents establishes that Telstar leased office space in
19 November 2000, for how long, and what business occurred at the leased premises. See,
20 e.g., Hal Roach Studios Inc. v. Feiner, 896 F. 2d 1542 (9th Cir. 1989).

21 **c) Lines 23-27 on Page 2**

22 Defendants object to Lines 23-27 on Page 2 as "hearsay, violates attachment rule,
23 plus no foundation that Mr. Corlis, as opposed to someone else, used an American
24 Express card apparently in the name of Mr. Corlis, pure speculation, no personal
25 knowledge." (Reply M. Dis. at p.2) (Doc. #32).

26 Lines 23-27 state: "I discovered that Mr. Corlis frequently used his American
27 Express Card in Arizona to purchase gas and building materials, which suggests that he
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1 was physically present in Arizona on several occasions and was transacting business for
2 Telstar during those visits." In its Supplemental Exhibits, Plaintiff submits copies of the
3 credit card statements. (Supp. Exhibits at A(3)) (Doc. #33).

4 The Court finds that because Plaintiff has not offered admissible evidence
5 demonstrating how the affiant learned or knew that Mr. Corlis frequently used an
6 American Express credit card in Arizona, this portion of Mausolf's affidavit will be
7 struck. See Fed. R. Civ. P. 602, 901.

8 **d) Line 2 on Page 3**

9 Finally, Defendants argue that no foundation exists for Mausolf's assertion that an
10 undisclosed place of alleged meeting was "Telstar's Arizona office." Because, however,
11 Mausolf offered admissible evidence that he personally attended the meeting at the office
12 space in Arizona, see Line 1 on Page 3, Plaintiff has proper foundation for this statement.

13 **2) Plaintiff's Exhibit C in Response to M. Dis.**

14 Next, Defendants argue that Exhibit C and any assertions based on it must be
15 struck because of a lack of foundation, improper authentication, and hearsay.

16 Exhibit C contains a xeroxed copy of an Arizona Corporation Commission,
17 Corporations Division Certificate of Disclosure allegedly completed by Mr. Corlis for
18 Telstar. It also contains an Application for Authority to Transact Business in Arizona
19 completed by Mr. Corlis for Telstar. This Application contains a file stamp from the
20 Arizona Corporation Commission indicating that it was received on May 6, 1997. The
21 file stamp also contains the signature of the Arizona Corporation Commission employee
22 who received the Application.

23 Fed. R. of Evid. 901(7) allows for authentication by evidence that a writing
24 authorized by law to be recorded or filed was in fact recorded or filed in a public office.
25 However, Plaintiff only offers a xeroxed copy of the documents. Therefore, absent
26 certification that the xerox exemplifies the original document on file, complete
27 foundation fails. Plaintiff again cites to State of La., ex. rel. Guste, 656 F. Supp. at 1314,
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1 for the proposition that requiring proper foundation serves no purpose because the
2 documents were received from Defendants. However, Plaintiff again failed to provide
3 evidence that the question that triggered production by Defendants of the documents
4 establishes that Defendant Corlis properly executed on behalf of Telstar the documents
5 that were filed in accordance with the law at the Arizona Corporation Commission.

6 Even if proper foundation exists, the evidence constitutes inadmissible hearsay.
7 Plaintiff offers it to prove the truth of the matter asserted, that Defendants applied to due
8 business in Arizona. While Fed. R. of Evid. 802(6) allows for an exception to hearsay for
9 records prepared and kept in the course of regularly conducted business activity and Fed.
10 R. Evid. 803(8) allows for an exception for public records, Plaintiff offers no evidence
11 that these documents are subject to these exceptions.

12 **3) Affidavit of Thomas Sjöholm**

13 Defendants object to three portions of Sjöholm's Affidavit.

14 **a) Paragraph 2**

15 Defendants object to Paragraph 2 based on "hearsay, no foundation, particularly as
16 to time of employment as Senior Project Manager, for assertion as to length of time
17 Telstar purportedly maintained an office in Arizona." (Reply M. Dis. at pp. 2-3) (Doc.
18 #32).

19 Paragraph 2 states: "Telstar did business in Arizona for approximately four years
20 and maintained an office within the State of Arizona at 943 South 48th Street in Tempe,
21 Arizona for approximately two years until early 2002."

22 Plaintiff points out that Sjöholm worked as a Senior Project Manager with Telstar
23 and swore that "I make this affidavit of my own personal knowledge and am competent to
24 testify as a witness herein." (Response M. Dis., Exhibit D ¶1) (Doc. #27). Therefore,
25 Plaintiff argues that this assertion overcomes Defendants' hearsay objection based on lack
26 of personal knowledge. See, e.g., Copiers Typewriters Calculators, Inc. v. Toshiba Corp.,
27 576 F. Supp. 312, 316 (D.C. Md. 1983) ("[H]e states at the end of the affidavit that he has
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1 personal knowledge of all the facts contained in the affidavit. . . . These statements are
2 sufficient to demonstrate knowledge”).

3 This argument is unpersuasive and the evidence must be excluded. In Carmen,
4 237 F.3d at 1028, the Ninth Circuit held that “[a] plaintiff’s belief . . . , without evidence
5 supporting the belief, is no more than speculation or unfounded accusation”
6 Sjöholm’s conclusory statement regarding Telstar’s business practices in Arizona,
7 without accompanying facts establishing that as Senior Project Manager he was in a
8 position to attest to the conclusion made, fails to provide proper foundation. See Fed. R.
9 Evid. 602, 901. Therefore, this portion of the Sjöholm affidavit will be excluded.

10 **b) Paragraph 3**

11 Defendants object to Paragraph 3 as “hearsay, speculation, no foundation, no
12 personal knowledge — particularly as to Mr. Corlis’ alleged ‘job duties’, how or what
13 alleged business Mr. Corlis ‘would travel to Arizona’ to conduct, Mr. Corlis’ alleged
14 ‘routine’ and what alleged ‘work-related activities’ Mr. Corlis ‘would spend three or four
15 days in Arizona on (sic).” (Reply M. Dis. at p. 3) (Doc. #32).

16 Paragraph 3 states: “As part of his job duties, Teryl Corlis would travel to Arizona
17 to conduct business on behalf of Telstar. Mr. Corlis’ routine was to travel to Arizona
18 approximately every other week and would spend three or four days in Arizona on work-
19 related activities.”

20 Plaintiff again points out that Sjöholm worked as a Senior Project Manager with
21 Telstar and swore that “I make this affidavit of my own personal knowledge and am
22 competent to testify as a witness herein.” (Response M. Dis., Exhibit D ¶1) (Doc. #27).
23 Plaintiff argues that this assertion overcomes Defendants’ hearsay objection based on lack
24 of personal knowledge. See, e.g., Copiers Typewriters Calculators, Inc., 576 F. Supp. at
25 316 (“[H]e states at the end of the affidavit that he has personal knowledge of all the facts
26 contained in the affidavit. . . . These statements are sufficient to demonstrate knowledge .

1 . . ."). However, the Court for the identical reasons set forth above, will exclude this
2 evidence. See supra pp. 13-14; Carmen, 237 F.3d at 1028.

3 **c) Paragraph 4**

4 Lastly, Defendants object to Paragraph 4 as "hearsay, no foundation, pure
5 speculation/opinion/no personal knowledge, particularly as to alleged basis or reason for
6 alleged travel and hearsay as to Mrs. Corlis alleged stay in Arizona 'until weather in
7 Albuquerque improved'." (Reply M. Dis. at p.3) (Doc. #32).

8 Paragraph 4 states: "During the time that I worked for Telstar, it was my
9 understanding that Mr. Corlis and his wife, Pauline Corlis, traveled to Arizona to spend
10 time in their residence in Arizona. I was aware that they traveled to Arizona on
11 weekends, and on at least one occasion during the winter months, Mr. Corlis indicated to
12 me that his wife had decided to stay in Arizona until the weather in Albuquerque
13 improved."

14 Sjöholm's statement is speculation as to the reasons behind the Corlis' travel to
15 Arizona. See Fed. R. Civ. P. 602 (requiring personal knowledge for admissibility).
16 Moreover, Sjöholm repeats what he was told by Mr. Corlis -- that Mr. Corlis learned that
17 his wife decided to stay in Arizona. This is admissible only if it is relevant that Mr.
18 Corlis made the statement, and not for the truth of the statement. See Fed. R. Civ. P. 801,
19 802.

20 **4) Affidavit of Rodney J. Tompkins**

21 Defendants only object to Paragraph 2 in the Tompkins Affidavit. Again, they
22 object on "hearsay, speculation, lacks foundation, no personal knowledge" (Reply
23 M. Dis. at p.3) (Doc. #32).

24 Paragraph 2 states: "Travelers began working with Telstar while Telstar was still
25 attempting to perform on its bonding contract obligations. During that timeframe (sic), I
26 was aware that Teryl Corlis was visiting Arizona in relation to Telstar projects in Arizona.
27 In fact, Travelers requested that Mr. Corlis refrain from visiting job sites in Arizona
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1 because of the ill will such visits caused with project owners and because Mr. Corlis'
2 presence at the job sites was disruptive to completion of the work."

3 Plaintiff argues that Tompkins, as a consultant retained by Travelers to help with
4 the handling of Telstar's bonds, made the affidavit based "on my own personal
5 knowledge." Thus, the Court should accept his statement as an established fact.
6 However, such conclusory statements are inadmissible absent accompanying facts
7 establishing personal knowledge. See, e.g., Carmen, 237 F.3d 1028.

8 **5) Exhibits G-K of Plaintiff's Response to M. Dis.**

9 Defendants seek to exclude Exhibits G-K for lack of foundation, no authentication,
10 and hearsay.

11 Exhibit G consists of a copy of Telstar's Summary of Significant Accounting
12 Policies from its March 31, 2001 and 2000 Notes to Financial Statements. This document
13 may constitute a regularly recorded business record pursuant to Fed. R. of Evid. 803(6).
14 However, to be admissible, proper foundation must be laid by either the custodian,
15 another qualified witness, or a certification that complies with Fed. R. of Evid. 902(11).
16 The evidence will be excluded. See supra pp.9-10.

17 Exhibit H contains a copy of the Article of Incorporation of Skycorp Electrical,
18 Inc. filed with the Arizona Corporation Commission. It contains a file stamp signed by an
19 employee of the Arizona Corporation Commission. Unfortunately, Plaintiff again fails to
20 provide any authentication for the xeroxed record. See Fed. R. Civ. P. 901(b)(7).
21 Moreover, the record fails to be self-authenticating under Fed. R. of Evid. 902(4) because
22 it is not certified.

23 Exhibit I contains filed stamped xerox copies of the State of Arizona Corporation
24 Commission Corporate Annual Report and Certificate of Disclosures for Telstar. Exhibit
25 J contains the Corlises' Note to Financial Statements July 1, 2000. Exhibit K contains a
26 copy of a construction contract between Telstar and Peoria Unified School District #11.

1 Unfortunately, Plaintiff also fails to properly lay foundation for the records. See Fed. R.
2 Civ. P. 901

3 **D. Motion to Dismiss**

4 Having addressed Defendants' M. Strike, the Court now moves to the Motion to
5 Dismiss. Defendants contend that there is a lack of personal jurisdiction under Fed. R.
6 Civ. P. 12(b)(2), improper venue under Fed. R. Civ. P. 12(b)(3) and insufficient process
7 and service of process under Fed. R. Civ. P. 12(b)(4) and 12(b)(5). As the Court finds a
8 lack of personal jurisdiction, only this argument will be discussed.

9 **1. Personal Jurisdiction**

10 **a. Legal Standard**

11 The plaintiff bears the burden of establishing personal jurisdiction. See, e.g.,
12 Ziegler v. Indian River County, 64 F.3d 470, 473 (9th Cir. 1995) (citing Farmers Ins.
13 Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990)); Data Disc.,
14 557 F.2d at 1285 (citing KVOS, Inc. v. Assoc. Press, 299 U.S. 269, 278 (1936));
15 Cummings v. W. Trial Lawyers Assoc., 133 F. Supp. 2d. 1144, 1151 (D. Ariz. 2001). A
16 defendant may move prior to trial to dismiss a complaint for lack of personal jurisdiction.
17 Fed. R. Civ. P. 12(b)(2); see, e.g., Data Disc, 557 F.2d at 1284 (citing Rule 12(b)(2)).
18 When a defendant does so, "the plaintiff is 'obligated to come forward with facts, by
19 affidavit or otherwise, supporting personal jurisdiction'" over the defendant. Cummings,
20 133 F. Supp.2d at 1151.

21 Because no statutory method for resolving the personal jurisdiction issue exists,
22 the district court determines the method of its resolution. See Data Disc, 557 F.2d at
23 1285 (citing Gibbs v. Buck, 307 U.S. 66, 71-72 (1939)). A district court may allow
24 discovery to help it determine whether it has personal jurisdiction over a defendant. See
25 id. at 1285 n.1 (citing Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430
26 n.24 (9th Cir. 1977)). In addition, a district court may hear evidence at a preliminary
27 hearing to determine its jurisdiction. See id. at 1285 n.2. At such a preliminary hearing,
28

1 the plaintiff must establish the jurisdictional facts by a preponderance of the evidence.
2 See id. at 1285. If the district court does not hear testimony or make findings of fact and
3 permits the parties to submit only written materials, then the plaintiff must make only a
4 prima facie showing of jurisdictional facts to defeat the defendant's motion to dismiss.
5 See Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 268 (9th Cir. 1995) (citing
6 Data Disc, 557 F.2d at 1285 and Farmers, 907 F.2d at 912); Ballard v. Savage, 65 F.3d
7 1495, 1498 (9th Cir. 1995); Ziegler, 64 F.3d at 473.³

8 Under this prima facie burden of proof, the plaintiff need only establish facts that
9 if true would support personal jurisdiction over the defendant. See Ballard, 65 F.3d at
10 1498 (citing Data Disc, 557 F.2d at 1285); Omeluk, 52 F.3d at 268.⁴ If the plaintiff
11 survives the motion to dismiss under a prima facie burden of proof, however, the plaintiff
12 still must prove the jurisdictional facts by a preponderance of the evidence at a
13 preliminary hearing or at trial. Data Disc, 557 F.2d at 1285 n.2 (citing Wells Fargo, 556
14 F.2d at 430 n.24).

15 Because no applicable federal statute governing personal jurisdiction exists,
16 Arizona's long-arm statute applies to this case. See Terracom v. Valley Nat'l Bank, 49
17 F.3d 555, 559 (9th Cir. 1995) (citing Core-Vent Corp. AB v. Nobel Indus., 11 F.3d 1482,
18 1484 (9th Cir. 1993)); Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc., 551 F.2d 784, 787 (9th
19 Cir. 1977) (citing Cook v. Fox, 537 F.2d 370 (9th Cir. 1976)). Arizona's long-arm statute
20 provides for personal jurisdiction to the extent permitted by the Due Process Clause of the
21 United States Constitution. Ariz. R. Civ. P. 4.2(a); see Doe v. Am. Nat'l Red Cross, 112

22
23 ³The written materials may consist of the pleadings, declarations, affidavits,
24 deposition testimony, exhibits, or other evidence. See Omeluk, 52 F.3d at 268.

25 ⁴See also Hancock v. Hitt, No. C-98-960-MMC-(ARB), 1998 WL 345392, at *2 (N.D.
26 Cal. June 19, 1998) ("plaintiff must produce admissible evidence to support the court's
27 exercise of personal jurisdiction"); Fujitsu-ICL Sys. Inc. v. Efmarm Serv. Co., No. 00-CV-
28 0777-W-(LSP), 2000 WL 1409760, at *3 (S.D. Cal. June 29, 2000) ("a prima facie showing
means that plaintiff has produced admissible evidence, which, if believed, would be
sufficient to establish the existence of personal jurisdiction").

1 F.3d 1048, 1050 (9th Cir. 1997); see also Uberti v. Leonardo, 181 Ariz. 565, 892 P.2d
2 1354, 1358, cert. denied, 516 U.S. 906 (1995) (stating that under Rule 4.2(a), "Arizona
3 will exert personal jurisdiction over a nonresident litigant to the maximum extent allowed
4 by the federal constitution").⁵

5 Absent traditional bases for personal jurisdiction (i.e., physical presence, domicile,
6 and consent) the Due Process Clause requires that nonresident defendants have certain
7 *minimum contacts* with the forum state such that the exercise of personal jurisdiction does
8 not offend traditional notions of fair play and substantial justice. See Int'l Shoe Co. v.
9 Washington, 326 U.S. 310, 316 (1945); Doe, 112 F.2d at 1050; Data Disc, 557 F.2d at
10 1287. The Due Process Clause protects a defendant's "liberty interest in not being
11 subject to the binding judgments of a forum with which he has established no meaningful
12 'contacts, ties or relations.'" Omeluk, 52 F.3d at 269-70 (quoting Burger King Corp. v.
13 Rudzewicz, 471 U.S. 462, 471-72 (1985)). "By requiring that individuals have 'fair
14 warning that a particular activity may subject [them] to the jurisdiction of a foreign
15 sovereign,' the Due Process Clause 'gives a degree of predictability to the legal system
16 that allows potential defendants to structure their primary conduct with some minimum
17 assurance as to where that conduct will and will not render them liable to suit.'" Id. at
18 270 (quoting Burger King, 471 U.S. at 472 (internal citations omitted)).

19 "In determining whether a defendant had minimum contacts with the forum state
20 such that the exercise of jurisdiction over the defendant would not offend the Due Process
21 Clause, courts focus on 'the relationship among the defendant, the forum, and the
22 litigation.'" Brink v. First Credit Resources, 57 F. Supp. 2d 848, 860 (D. Ariz. 1999)
23 (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). If a court determines that a
24 defendant's contacts with the forum state are sufficient to satisfy the Due Process Clause,
25 then the court must exercise either "general" or "specific" jurisdiction over the defendant.

26
27 ⁵Rule 4.2(a) provides, in pertinent part: "A court of this state may exercise personal
28 jurisdiction over parties, whether found within or outside the state, to the maximum extent
permitted by the Constitution of this state and the Constitution of the United States."

1 See Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-15 nn.8-9 (1984);
2 Doe, 112 F.3d at 1050; Ziegler, 64 F.3d at 473 (citing Reebok Int'l Ltd. v. McLaughlin,
3 49 F.3d 1387, 1391 (9th Cir. 1995)). The nature of the defendant's contacts with the
4 forum state will determine whether the court exercises general or specific jurisdiction
5 over the defendant. Id.

6 **1) General jurisdiction**

7 A court may assert general jurisdiction over a defendant "[i]f the defendant's
8 activities in the state are 'substantial' or 'continuous and systematic,' . . . even if the
9 cause of action is unrelated to those activities." Doe, 112 F.3d at 1050-51 (quoting
10 Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1396 (9th Cir.
11 1986)); see Ziegler, 64 F.3d at 473; Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986);
12 Data Disc, 557 F.2d at 1287 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S.
13 437, 446-47 (1952)).

14 **2) Specific jurisdiction**

15 If a defendant has not had substantial or continuous and systematic contacts with
16 the forum state, then the court must determine whether the defendant has had sufficient
17 contacts with the forum state such that the exercise of specific jurisdiction over the
18 defendant would not offend the Due Process Clause. See Int'l Shoe, 326 U.S. at 316;
19 Core-Vent, 11 F.3d at 1485. The Ninth Circuit applies a three-part test to determine
20 whether the defendant's contacts with the forum state are sufficient to subject him to the
21 state's specific jurisdiction. Under this three-part test, specific jurisdiction exists only if:
22 (1) the defendant *purposefully availed* himself of the privileges of conducting activities in
23 the forum, thereby invoking the benefits and protections of its laws, or purposely directs
24 conduct at the forum that has *effects* in the forum; (2) the claim *arises out of* the
25 defendant's forum-related activities; and (3) the exercise of jurisdiction comports with
26 fair play and substantial justice, i.e., it is *reasonable*. See, e.g., Bancroft & Masters, Inc.
27 v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citing Cybersell, Inc. v.
28

1 Cybersell, Inc. 130 F.3d 414, 417 (9th Cir. 1997)); Amba Mktg., 551 F.2d at 789 (citing
2 L.D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 773-74 n.12 (9th Cir.
3 1959)); Chandler v. Roy, 985 F. Supp. 1205, 1211 (D. Ariz. 1997); see also Burger King,
4 471 U.S. at 472-76.

5 a) “purposeful availment” and “effects” tests

6 In discussing the specific jurisdiction test, the United States Supreme Court
7 emphasized long ago that “it is essential in each case that there be some act by which the
8 defendant *purposefully avails* itself of the privilege of conducting activities *within the*
9 *forum State*, thus invoking the benefits and protections of its laws.” Hanson v. Denckla,
10 357 U.S. 235, 253 (1958) (emphasis added). More recently, the Supreme Court held that
11 a court may also have specific jurisdiction over a defendant where the intended *effects* of
12 the defendant’s *non-forum conduct* were purposely directed at and caused harm in the
13 forum state. Calder v. Jones, 465 U.S. 783, 788-90 (1984) (adopting “effects test” for
14 libel, invasion of privacy, and intentional infliction of emotional distress claims where
15 defendant’s Florida conduct had “effects” in California, the forum state).⁶

16 Consistent with this precedent, the Ninth Circuit has held that a district court
17 should apply different specific jurisdiction tests to contract and tort cases. See Ziegler, 64
18 F.3d at 473; Roth v. Garcia Marquez, 942 F.2d 617, 621 (9th Cir. 1991) (stating that in
19 determining whether court has specific jurisdiction over defendant, “[i]t is important to
20 distinguish contract from tort actions”); see also Cummings, 133 F. Supp. 2d. at 1153. In
21 cases involving certain types of torts, the Ninth Circuit has held that courts should apply
22 the “effects test” and that “jurisdiction may attach if an out-of-forum defendant merely
23 engages in conduct aimed at, and having an effect in, the situs state.” Ziegler, 64 F.3d at
24

25 ⁶Cf. Sinatra v. Nat’l Enquirer, 854 F.2d 1191, 1195 (9th Cir. 1988) (“[The decisions
26 of this court have interpreted the holdings of Calder and Burger King as modifying the
27 purposeful availment rubric to allow ‘the exercise of jurisdiction over a defendant whose
28 only ‘contact’ with the forum is the ‘purposeful direction’ of a *foreign* act having *effect* in
the forum state.’”) (quoting Haisten, 784 F.2d at 1397) (emphasis in original).

1 473 (applying effects test because section 1983 claim “is more akin to a tort claim than a
2 contract claim”); see Dole Food Co., Inc. v. Watts, 2002 U.S. App. LEXIS 18524, No.
3 01-55002 (9th Cir. Mar. 4, 2002) (applying effects test to fraud, deceit, and conversion
4 claims); Caruth v. Int’l Psychoanalytical Ass’n, 59 F.3d 126, 128 n.1 (9th Cir. 1995)
5 (applying effects test to defamation, tortious interference with business relations, and
6 intentional infliction of emotional distress claims); Core-Vent, 11 F.3d at 1486 (libel);
7 Brainerd v. Governors of the Univ. of Alberta, 873 F.2d 1257, 1259 (9th Cir. 1989)
8 (defamation and tortious interference with contract); see also Cummings, 133 F. Supp. 2d.
9 at 1153 (applying effects test as to individual defendants’ conduct because plaintiff had
10 “alleged only tort causes of action against” defendants).⁷

11 In cases arising out of contractual relationships, including those involving related
12 tort claims, the Ninth Circuit applies the “purposeful availment” test enunciated in
13 Hanson, which “requires that the defendant engage in some form of affirmative conduct
14 allowing or promoting the transaction of business within the forum state. This focus on
15 the defendant’s affirmative conduct is designed to ensure that the defendant is not haled
16 into court as the result of random, fortuitous, or attenuated contacts.” Gray & Co. v.
17 Firstenberg Mach. Co., 913 F.2d 758, 760 (9th Cir. 1990) (quoting Shute v. Carnival
18 Cruise Lines, 897 F.2d 377, 381 (9th Cir. 1990), rev’d on other grounds, 499 U.S. 585
19 (1991)) (applying purposeful availment test in case involving sale of used filter where
20 plaintiff brought action for rescission, breach of warranty, and misrepresentation); see
21 Roth, 942 F.2d 617, 621 (9th Cir. 1991) (applying purposeful availment test in breach of
22 contract action); McGlinchy v. Shell Chem. Co., 845 F.2d 802, 817 (9th Cir. 1988)
23 (finding effects test inapplicable and stating that, “unlike Calder and Haisten, in this case
24

25 ⁷See also Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998)
26 (applying effects test because trademark infringement and unfair competition case was akin
27 to tort case); Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1087 (9th Cir.
28 2000) (declaratory judgment action involving trademark infringement); AT&T Co. v.
Compagnie Bruxelles Lambert, 94 F.3d 586, 590 (9th Cir. 1996) (CERCLA claim).

1 personal jurisdiction is sought on a contract claim, not on a tort claim.”).⁸ A defendant
2 has engaged in affirmative conduct and thereby “purposely availed himself of the benefits
3 of a forum if he has deliberately ‘engaged in significant activities within a State or has
4 created ‘continuing obligations’ between himself and the residents of the forum.” Gray,
5 913 F.2d at 760 (quoting Burger King, 471 U.S. at 475-76); see Cybersell, 130 F.3d at
6 417 (stating that “the ‘purposeful availment’ requirement is satisfied if the defendant has
7 taken deliberate action within the forum state or if he has created continuing obligations
8 to forum residents”) (citing Ballard, 65 F.3d at 1498).

9 Finally, in analyzing the purposeful availment requirement, the Ninth Circuit
10 performs a *qualitative* evaluation of the defendant’s contact with the forum state to
11 determine whether the “‘defendant’s conduct and connection with the forum [s]tate are
12 such that he should reasonably anticipate being haled into court there.’” Core-Vent, 11
13 F.3d at 1484 (quoting Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297
14 (1980)); Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, 614
15 F.2d 1247, 1252 (9th Cir. 1980) (stating that “it is not the quantity, but rather the ‘nature
16 and quality’ of the defendant’s activities which determine whether extension of
17 jurisdiction offends due process”).

18 **b) “arising out of” requirement**
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22 ⁸See also Medcap Credit Co. v. Boyes, No. CIV-99-1151-AS, 2000 WL 249352, at *3
23 (D. Or. Feb. 22, 2000) (applying purposeful availment test in action for misrepresentation
24 and conversion based on defendants’ representations before plaintiffs entered into sale
25 agreement and stating: “Although [plaintiffs’] case sounds in tort, the claims arise out of
26 their contractual relationship with [defendants].”); Hancock, 1998 WL 345392, at *2
27 (applying purposeful availment test in breach of contract and fraud action and stating:
28 “Although one of plaintiff’s claims sounds in tort, all of plaintiff’s claims arises [sic] out of
an alleged contractual relationship.”). Cf. Core-Vent, 11 F.3d at 1486 (applying effects test
in libel action but stating that, “in McGlinchy, . . . we refused to apply the Calder effects test
when the *underlying action involved a contract dispute*, not a tort”) (emphasis added).

1 The Ninth Circuit has adopted a “but for” test for determining whether a plaintiff’s
2 cause of action *arises out of* a defendant’s forum related activities. Doe, 112 F.3d at
3 1051; see Omeluk, 52 F.3d at 271. The “arising out of” requirement is met if *but for* the
4 contacts between the defendant and the forum state, the cause of action would not have
5 arisen. See Terracom, 49 F.3d at 561. In Shute v. Carnival Cruise Lines, the Ninth
6 Circuit reasoned that:

7 The ‘but for’ test is consistent with the basic function of the ‘arising out of’
8 requirement—it preserves the essential distinction between general and
9 specific jurisdiction. Under this test, a defendant cannot be haled into court
10 for activities unrelated to the cause of action in the absence of a showing of
substantial and continuous contacts sufficient to establish general
jurisdiction. . . . The ‘but for’ test preserves the requirement that there be
some nexus between the cause of action and the defendant’s activities in the
forum.

11 897 F.2d at 385.

12 **c) “reasonableness” requirement**

13 An unreasonable exercise of jurisdiction violates the Due Process Clause even if
14 the “purposeful availment” and “arising out of” requirements of the specific jurisdiction
15 test are satisfied. See Int’l Shoe, 326 U.S. at 316 (1945) (holding that exercise of
16 personal jurisdiction must “not offend traditional notions of fair play and substantial
17 justice”); Ziegler, 64 F.3d at 474-75. A district court presumes, however, that its exercise
18 of jurisdiction over a defendant is reasonable if the first two requirements of the specific
19 jurisdiction test are met. See Ballard, 65 F.3d at 1500 (citing Sher v. Johnson, 911 F.2d
20 1357, 1364 (9th Cir. 1990)). If the first two requirements are satisfied, then the burden of
21 proof shifts and the defendant must “‘present a compelling case that the presence of
22 some other considerations would render jurisdiction unreasonable.’” Id. (quoting Burger
23 King, 471 U.S. at 477).

24 The Ninth Circuit considers the following seven factors to determine whether the
25 exercise of specific jurisdiction over a defendant is reasonable: (1) the extent of the
26 defendant’s purposeful interjection into the forum state; (2) the burden on the defendant
27 of litigating in the forum; (3) the extent of conflict with the sovereignty of the defendant’s
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1 state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient
2 judicial resolution of the dispute; (6) the importance of the forum to the plaintiff's interest
3 in convenient and effective relief; and (7) the existence of an alternative forum. See
4 Ziegler, 64 F.3d at 475 (citing Terracom, 49 F.3d at 561); Core-Vent, 11 F.3d at 1487-88
5 (citing Paccar Int'l, Inc. v. Commercial Bank of Kuwait, 757 F.2d 1058, 1065 (9th Cir.
6 1985)) see also Worldwide Volkswagen, 444 U.S. at 292 (listing several of the seven
7 factors).

8 **b. Analysis**

9 **1) Specific Jurisdiction Does Not Exist**

10 As explained above, a three part test applies for determining specific jurisdiction:
11 (1) the defendant purposefully availed himself of the privileges of conducting activities in
12 the forum, or purposefully directed conduct at the forum that has effects on the forum; (2)
13 the claim arises out of the defendant's forum-related activities; and (3) the exercise of
14 jurisdiction comports with fair play and substantial justice.

15 **(a) Purposeful Availment Test Applies**

16 This case arises out of a contract where the Defendants agreed to indemnify
17 Plaintiff against all claims and losses arising out of any bonds issued by the Plaintiff to
18 the Defendants. Plaintiff maintains that it has paid claims and incurred expenses because
19 of the agreement with Defendants, for which Defendants are required to reimburse
20 Plaintiff. These causes of action arise out of a contractual relationship. Accordingly, the
21 Court applies the purposeful availment test to determine whether it has specific
22 jurisdiction. See, e.g., McGlinchy, 845 F.2d at 817.

23 The purposeful availment test requires that the Defendants allegedly engaged in
24 affirmative conduct allowing or promoting the transaction of business within the forum
25 state by either (1) deliberately taking part in significant activities within the state, or (2)
26 creating continuing obligations between themselves and the residents of the forum. Gray,
27 913 F.2d at 760. In analyzing the purposeful availment requirement, the Court performs a
28

1 qualitative evaluation of the Defendants' contacts with Arizona to determine whether its
2 "conduct and connection with [Arizona] are such that [it] should reasonably anticipate
3 being haled into court [here]." Core-Vent, 111 F.3d at 1484 (quoting Worldwide
4 Volkswagen, 444 U.S. at 297).

5 **(1) Telstar Never Purposefully Availed**

6 After excluding all inadmissible evidence, Plaintiff cannot establish purposeful
7 availment by Telstar. The evidence shows that Plaintiff seeks to enforce a claim of
8 performance under an indemnification obligation arising from an agreement executed and
9 to be performed in New Mexico. None of the admissible evidence establishes that Telstar
10 deliberately took part in significant activities within Arizona or created continuing
11 obligations between itself and Arizona residents concerning the indemnification
12 obligation.

13 First, Plaintiff offers evidence of a meeting occurring in November 2001 between
14 Telstar employees and Mausolf in an Arizona office that Mausolf perceived to be owned
15 by Telstar. (Pl. Resp. M. Dis., Exhibit A p.3) (Doc. #27). However, no evidence
16 establishes that this meeting either related to the present action or that Telstar routinely
17 used this office space to conduct business in Arizona in connection with the agreement at
18 issue.

19 Next, Plaintiff offers other non-specific conduct in an effort to establish specific
20 jurisdiction. Plaintiff's proof, however, of a valid General Commercial Contractor
21 licence issued to Telstar fails to establish that Telstar previously used or currently uses the
22 license to conduct business in Arizona related to the indemnification agreement at issue in
23 this case. Telstar admits only to occasional work in Arizona, all of which it completed
24 prior to January 2002.

25 Such minimal contacts with Arizona fail to establish that Telstar would anticipate
26 being haled into an Arizona court to address issues related to the New Mexico executed
27 indemnification agreement.

28

1 **(2) Corlis Never Purposefully Availed**

2 Plaintiff contends that Defendant Terryl Corlis is the President and sole
3 shareholder of Telstar. Defendant Pauline Corlis is also an officer and director of Telstar.
4 Defendants argue that there is no jurisdiction over Mr. and Mrs. Corlis because they were
5 acting in their official capacity as representatives of Telstar.

6 The Ninth Circuit in Forsythe v. Overmyer, 576 F.2d 779, 783-84 (9th Cir.), cert.
7 denied, 439 U.S. 864 (1978), stated “a corporate officer who has contact with a forum
8 only with regard to the performance of his official duties is not subject to personal
9 jurisdiction in that forum.” However, the Ninth Circuit has found that “Arizona’s
10 long-arm statute may, consistent with constitutional due process, allow assertion of
11 personal jurisdiction over officers of a corporation as long as the court finds those officers
12 to have sufficient minimum contacts with Arizona.” Davis v. Metro Productions, Inc.,
13 885 F.2d 515, 522 (9th Cir. 1989) (citing Retail Software Servs., Inc. v. Lashlee, 854 F.2d
14 18, 22-3 (2d Cir. 1988)). “Accordingly, the jurisdictional question in this action is
15 whether the Court’s exercise of jurisdiction accords with ‘traditional notions of fair play
16 and substantial justice’ embodied in the Due Process clause of the Fourteenth
17 Amendment and not whether the fiduciary shield doctrine bars jurisdiction.” Brink, 57 F.
18 Supp.2d at 860 (citing MacPherson, 762 P.2d at 599).

19 With respect to Mr. Corlis, Plaintiff argues that he “not only earned income in
20 Arizona but injected himself into commercial activity here on many occasions by
21 soliciting business for Telstar and by traveling here to manage that business.” Pl.’s Resp.
22 Mot. Dismiss at 11. Plaintiff alleges that Mrs. Corlis acted as an officer for Telstar,
23 “intentionally [undertaking] action to cause income to be earned in Arizona,” Id. at 10.

24 The Court finds this argument unpersuasive. The fact that the Corlises admit
25 earning income prior to January 2002 from occasional work completed in Arizona fails to
26 establish purposeful availment. Moreover, sporadic unrelated vacation visits to Arizona
27 fail to establish sufficient minimal contacts. Neither of these past experiences in Arizona
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1 alerted the Corlises to the possibility of being haled into Arizona courts over the New
2 Mexico executed indemnification agreement, as none of the alleged activities appear
3 sufficiently to relate to the indemnification agreement.

4 **(b) "Arising Out Of" Requirement**

5 Turning to the second prong of the specific jurisdiction test, Plaintiff provides no
6 admissible evidence that this cause of action would not have arisen but for the
7 Defendants' contacts with Arizona. Moreover, all of Plaintiff's offered evidence of
8 alleged contacts, including those proffered that are inadmissible, relate to general
9 jurisdiction, not jurisdiction specifically related to this action. Plaintiff offers nothing to
10 persuade the Court to exercise jurisdiction over the alleged breach of contract action
11 arising out of a New Mexico executed contract which operates under New Mexico law.

12 **(c) "Reasonableness" Requirement**

13 Plaintiff's failure to satisfy the purposeful availment test and the arising out
14 requirement eliminates the presumption that exercise of jurisdiction over the Defendants
15 is reasonable. See Ballard, 65 F.3d at 1500 (citing Sher v. Johnson, 911 F.2d 1357, 1364
16 (9th Cir. 1990)). Therefore, the burden of proof remains on Plaintiff. Plaintiff offers no
17 explanation for why it would be reasonable for an Arizona court to exercise jurisdiction
18 over Defendants in the absence of any evidence establishing that any aspect of the dispute
19 relates to or occurred in Arizona. Plaintiff therefore fails to satisfy its burden of proof
20 that jurisdiction would be reasonable in Arizona.

21 **2) General Jurisdiction Does Not Exist**

22 Courts assert general jurisdiction if the defendant's activities in the state are
23 "substantial" or "continuous and systematic." Haisten, 784 F.2d at 1296. Defendants'
24 activities in Arizona cannot be classified as "substantial" and/or "continuous and
25 systematic."

26 **(a) Defendant Telstar**
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1 Plaintiff concedes that Defendant Telstar is a New Mexico Corporation, but
2 alleges that Telstar maintained a commercial general contractor's license in Arizona, and
3 was authorized to do business in Arizona. However, Plaintiff offers no evidence that
4 Defendant performed any substantial or continuous and systematic work in Arizona.
5 Telstar provides evidence that it maintained its books and principal place of business in
6 New Mexico and only performed occasional business in Arizona prior to January 2002.
7 (Def. SOF ¶¶13, 14). Therefore, the Court finds that insufficient evidence exists to
8 establish general jurisdiction over Telsar.⁹

9 **(b) Defendants Terryl and Pauline Corlis**

10 Plaintiff maintains that Defendants Terryl and Pauline Corlis were earning income
11 in Arizona to the extent that their corporation, Telstar, was earning income in Arizona.
12 Mr. and Mrs. Corlis own a home in Maricopa County, Arizona, which is only used as a
13 vacation residence. Considering the minimal nature of the Corlises visits to Arizona and
14 the lack of evidence regarding the amount or duration of income earned by them in
15 Arizona, these allegations are insufficient to submit the Corlises to general jurisdiction in
16 the state of Arizona. See, e.g., Doe, 112 F.3d at 1050-51. Moreover, as the Corlises were
17 served at their *New Mexico* residence, service fails to establish personal jurisdiction in
18 Arizona.

19 Accordingly,

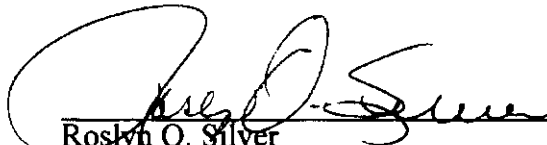
20 **IT IS ORDERED** that Defendants' Motion to Dismiss Pursuant to Rule 12(b) on
21 Behalf of Defendants Telstar Construction Company, Inc., Terryl D. Corlis and Pauline
22 Corlis (Doc. #10) is **GRANTED** without prejudice.

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26 ⁹The Court notes that, to the extent Plaintiff suggests that personal jurisdiction may
27 be established by contacts occurring *after* the date its cause of action accrued, it incorrectly
28 interprets the law. Personal jurisdiction is determined at the time the cause of action is
brought. See generally Int'l Shoe Co., 326 U.S. 310.

1 **IT IS FURTHER ORDERED** that Plaintiff's Request for Leave to File
2 Supplemental Exhibits in Support of Response to Motion to Dismiss (Doc. #33) is
3 **GRANTED**.

4 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike Affidavits and
5 Documents Submitted by Plaintiff (Doc. #39) is **DENIED** in part and **GRANTED** in
6 part.

7 DATED this 5 day of March, 2003.

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11 Roslyn O. Silver
12 United States District Judge
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